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Evidence and Ethics—Letting the Client Rest in Peace: Attorney-Client Privilege Survives the Death of the Client. Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

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EVIDENCE AND ETHICS—LETTING THE CLIENT REST IN PEACE: ATTORNEY-CLIENT PRIVILEGE SURVIVES THE DEATH OF THE CLIENT. *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

I. INTRODUCTION

> *The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy . . . . There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity . . . . Dents to the reputation in the legal profession are irreparable.*[1]

When Vince Foster spoke the above words during his commencement address at the University of Arkansas Law School some five years ago, it is unlikely he had on his mind the intent to bring the attorney-client relationship under scrutiny before the United States Supreme Court. Yet it was his concern for his own reputation that, with a few twists and turns, ultimately provided him a significant legal legacy that will forever affect attorney-client relationships. In *Swidler & Berlin v. United States*,[2] the United States Supreme Court held that the attorney-client privilege survives the death of the client.[3] Though this had been widely recognized as the prevailing common law interpretation, the Court set to rest fears of a fading privilege or the need for a confidentiality disclaimer at the outset of the attorney-client relationship.[4]

This note examines the unusual and unexpected facts under which *Swidler* arose. With the post-mortem privilege in mind, the note then discusses the historical development of the attorney-client confidential communications privilege, including the philosophical rationale for such a privilege as well as its real-world practical effect. The past erosion of the attorney-client privilege and the attempt to create a post-mortem exception to the privilege are also

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1. Vincent W. Foster, Jr., Roads We Should Travel, Commencement Address at the Law School, University of Arkansas, Fayetteville, Arkansas (May 8, 1993), *reprinted by* The Arkansas Bar Association.

2. 118 S. Ct. 2081 (1998).

3. *See id.*

4. *See generally In re* Sealed Case, 124 F.3d 230, 237 (D.C. Cir. 1997) (Tatel, J., dissenting). In his dissent, Judge Tatel compared an attorney's explanation to a client where post-mortem privilege is protected ("I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. Now, please tell me the whole story.") with a hypothetical disclaimer where the post-mortem privilege is not protected:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Id. at 238-39 (Tatel, J., dissenting) (emphasis in original).

examined. The note next turns to an analysis of the Court's reasoning in the *Swidler* opinion. In closing, this note evaluates the significance of the holding, suggesting that while any erosion to the confidential communications privilege has been temporarily halted, the lack of conclusive data on the effects of confidentiality suggests it has been halted by default only. Also considered in the significance is the Court's implicit mandate to the legal profession to uphold the privilege in an honorable fashion.

II. FACTS

On July 20, 1993, Vince W. Foster, Jr., age 48, took his own life.[5] A respected attorney, he had spent the year prior to his death as President Clinton's deputy White House counsel.[6] In the months following his suicide, a complicated portrait of Foster emerged as a depressed and stressed perfectionist, obsessed with the recent press assaults on his ethics.[7] As a comprehensive picture of the work-related pressures bearing down on Foster developed, it became clear that foremost among them was a deep concern for the potential ramifications from his role, as well as that of others, in the White House Travel Office firings.[8]

This deep concern led Foster to Washington, D.C. attorney James Hamilton on a Sunday afternoon nine days before his death.[9] After assuring Foster their conversation was privileged, Hamilton listened and took notes as Foster divulged his concerns and, apparently, some potentially critical facts.[10]

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5. *See* David Von Drehle, *The Crumbling of a Pillar in Washington; Only Clinton Aide Foster Knew What Drove Him to Fort Marcy*, THE WASH. POST, Aug. 15, 1993, at A1.

6. *See id.*

7. *See* Jason DeParle, *A Life Undone—A Special Report; Portrait of a White House Aide Ensnared by His Perfectionism*, N.Y. TIMES, Aug. 22, 1993, at 1; Von Drehle, *supra* note 5, at A1.

8. *See* Stephen Labaton, *Supreme Court Hears Case on Ex-White House Counsel's Notes*, N.Y. TIMES, June 9, 1998, at A19. On May 19, 1993, among allegations of financial mismanagement, seven career employees of the White House Travel Office were fired. Initially the FBI was brought in to investigate, and several other investigations followed—of the White House handling (or mishandling) of the firings. *See generally* Brief for Respondents at 3 and n.1, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192) (describing briefly the events and controversy regarding the White House Travel Office firings).

9. *See* Brief for Petitioners at 2, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192). Hamilton's law firm, Swidler & Berlin, is the named petitioner in the case. Hamilton, the author of a book on representing clients before congressional hearings, has represented several public figures facing ethics investigations. *See* Roger Parloff, *Can We Talk?*, AM. LAW., June 1998, at 5, 7.

10. *See* Brief for Petitioners at 2. *See also All Things Considered* (National Public Radio broadcast, June 8, 1998), *available in* 1998 WL 3645234. Hamilton explained:

> We talked for two hours in my living room. I took three pages of notes. Before the conversation started, Mr. Foster said: 'Jim, is this a privileged conversation?' And

Two years later, while investigating the White House travel office firings, a federal grand jury under the direction of Independent Counsel Kenneth Starr subpoenaed those same notes.[11] Hamilton and his law firm moved to quash or modify the subpoena, and after inspecting Hamilton's notes from his meeting with Foster, the United States District Court for the District of Columbia agreed that the notes were protected from disclosure by the attorney-client and work product privileges.[12]

In *In re Sealed Case*,[13] the Court of Appeals for the District of Columbia Circuit reversed and remanded, ordering the district court to apply a balancing test to determine whether Hamilton's notes should be disclosed.[14] The court of appeals recognized (and the parties agreed) that the notes would be subject to privilege if Foster were alive.[15] However, because the factual information contained in the notes was no longer available elsewhere due to Foster's death, the court of appeals found that a qualification of the privilege was in order.[16]

Such a qualification would allow the post-mortem use (in criminal matters) of privileged information gleaned from the attorney-client relationship upon a showing of substantial relative importance.[17] Under the reasoning of the court of appeals, the scope of the post-mortem attorney-client privilege should not be absolute; rather, it should be subject to narrow exception.[18]

The United States Supreme Court granted certiorari[19] to examine the scope of the attorney-client privilege after the death of the client.[20] In particular, the

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> I said: 'of course.' It is my opinion, as I've said to the court of appeals, that had I answered that question 'no,' there would have been no conversation and no notes.

Id.

11. *See id.*

12. *See Swidler*, 118 S. Ct. at 2083. Presiding at the district court level was Chief Judge John Garrett Penn. [Author's note: The Supreme Court predicated its opinion on the attorney-client confidential communications privilege alone; therefore, this note will not discuss Petitioners' work product claims or the work product doctrine.]

13. 124 F.3d 230 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

14. *See id.*

15. *See id.* at 231.

16. *See id.*

17. *See id.* at 235.

18. *See id.* at 234. Specifically, the court of appeals stated:

> Although witness unavailability alone would not justify qualification of the privilege, we think that unavailability through death, coupled with the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after the death of the client) where the privilege should not automatically apply.

Id. For further discussion of the reasoning of the court of appeals, see *infra* text accompanying notes 84 to 87.

19. *See* Swidler & Berlin v. United States, 118 S. Ct. 1358 (1998).

20. *See Swidler*, 118 S. Ct. at 2084.

Court agreed to consider whether the privilege should be absolute, or whether a balancing test should apply.[21] In keeping with centuries of common law historical practice, the Court held that the notes were protected by the attorney-client privilege.[22]

III. BACKGROUND

A. The Evidentiary Attorney-Client Privilege and the Ethical Duty of Confidentiality

1. *A Brief History of Confidential Communications in the Attorney-Client Relationship*

The confidential communications privilege enjoyed within the attorney-client relationship is born of two bodies of law: evidence and ethics.[23] As the oldest of the confidential communication privileges, the Anglo-American evidentiary attorney-client privilege dates back over four hundred years to the reign of Elizabeth I.[24] The early impetus for the privilege developed from the value placed on an attorney's honor, yet by the mid-nineteenth century the underlying focus shifted to the needs of the client—in particular, the need to foster a sense of security for the client soliciting legal advice.[25]

While the American judiciary has protected attorney-client communications under the evidentiary privilege from its earliest times, the touchstone for the current scope of the privilege is Federal Rule of Evidence 501, enacted in 1975.[26] The present version of Rule 501, which calls on the courts to review

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21. *See id.*

22. *See id.*

23. *See* Brian R. Hood, Note and Comment, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 745 (1994).

24. *See* 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (John T. McNaughton rev. 1961). Professor Wigmore has the distinction of most famously articulating the elements of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. at § 2292.

25. *See id.* at § 2290. An interesting function of the early focus on the individual honor of the attorney, rather than the role of the client, was that it afforded attorneys the discretion to waive the attorney-client privilege where honor so dictated. *See id.*

26. *See* Casey Nix, Note, In re Sealed Case: *The Attorney-Client Privilege—Till Death Do Us Part?*, 43 VILL. L. REV. 285, 285-86 & n.4 (1998); FED. R. EVID. 501. Rule 501 provides in pertinent part that "the privilege of a witness, person, government, State or political

the interplay of the existing common law with reason and experience, is substantially broader and significantly more general than the original proposed version.[27] Proposed Supreme Court Standard 503, which Congress rejected in favor of the generic Rule 501, would have recognized the post-mortem attorney client privilege as surviving the death of the client.[28]

In contrast to the dusty origins of the evidentiary privilege, the ethical requirement of confidentiality is a relatively recent development. In 1928, fifty years after the birth of the American Bar Association, an attorney's ethical duty towards confidentiality was first formally spelled out in Canon 37 of the Canons of Professional Ethics.[29] Canon 37, titled "Confidences of a Client," called on attorneys to preserve client confidences for the client's benefit.[30] The canon made no direct mention of the duty of confidentiality after the death of a client except to indicate that the confidential nature of communications outlasted the attorney-client relationship itself.[31] While Canon 37 was viewed as a standard to which the legal profession should aspire, its successor under the Model Code of Professional Responsibility mandated compliance rather than honorable aspiration.[32] The Model Code also granted an indefinite

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subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

27. *See* FED. R. EVID. 501 advisory committee's note. Of the proposed thirteen Standards (presented as rules for Congress's approval), nine specified the particulars of privileges including the lawyer-client privilege. Congress modified these thirteen rules into the existing general Rule 501, applicable in the federal court system. The language of Rule 501 was modeled after Rule 26 of the Federal Rules of Criminal Procedure. *See id.*

28. *See* SUPREME COURT STANDARD 503 (1974), advisory committee note regarding STANDARD 503(d)(2). The Standards, while not part of the Federal Rules of Evidence, do serve as guidelines to the status of common law privileges in 1974. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.10 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). An Advisory Committee of judges, attorneys, and scholars developed the Standards over seven years and three drafts. *See id.* The Supreme Court voted 8 to 1 to adopt them. *See id.*

29. *See* Hood, *supra* note 23, at 750 & n.52.

30. *See* Hood, *supra* note 23, at 751; CANONS OF PROFESSIONAL ETHICS Canon 37 (1908).

31. *See* CANONS OF PROFESSIONAL ETHICS Canon 37 (stating "[i]t is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . . .") Indeed, the American Bar Association pointed out this early assertion of the continuing nature of attorney-client confidentiality in its amicus brief. *See* Brief for the American Bar Association as Amicus Curiae in Support of Petitioners at 1, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192).

32. *See* Hood, *supra* note 23, at 751-52. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969), titled "Preservation of Confidences and Secrets of a Client," stated:

> Confidence refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> Except when permitted under [this rule], a lawyer *shall not* knowingly:

presumption to the continuation of the attorney-client confidential communications privilege.[33]

The modern day ethical standard on attorney-client confidentiality was established in 1983 under the Model Rules of Professional Conduct.[34] While continuing the principles set out in the Model Code, Model Rule 1.6 significantly expanded the protections afforded attorney-client communication by curtailing the circumstances under which a lawyer could reveal the intended crime of a client.[35] The Model Rules did not, however, vary the ABA's stance that the ethical obligation to preserve client confidentiality is ongoing.[36]

2. *Tension Between the Evidentiary and Ethical Rules Governing Confidentiality*

Ideally, there should be no conflict between the evidentiary and ethical rules governing confidentiality. The evidentiary rule regarding confidential communications should apply in legal proceedings, for example, where a lawyer is asked to provide evidence or testimony regarding a client.[37] The ethical rule should apply in all other situations, governing not only the

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> Reveal a confidence or secret of his client.
> Use a confidence or secret of his client to the disadvantage of the client.
> Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure . . . .

Id. (emphasis added).

33. *See* Hood, *supra* note 23, at 752 & n.69; ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1969) provided: "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." *Id.*

34. *See* Hood, *supra* note 23, at 752.

35. *See* Hood, *supra* note 23, at 751-54. Under Canon 37, an attorney could reveal "[t]he announced intention of a client to commit a crime . . . [and] properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened." *See* ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1908). Similarly, under Model Rule DR 4-101(C)(3), an attorney was permitted to reveal the intent of his client "to commit a crime and the information necessary to prevent the crime." *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969). ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) broadened the privilege, allowing an attorney to reveal his client's criminal intent only where imminent death or substantial bodily harm will likely result. *See id.* Of interest to the Arkansas practitioner, ARKANSAS RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996) permits an attorney to disclose a client's intent to commit *any* crime; a substantially broader, but similarly discretionary, authority. *See id.*

36. *See* Brief for the American Bar Association as Amicus Curiae at 1-2. "The ABA Standing Committee on Ethics and Professional Responsibility takes the view that this obligation [to keep client confidences] continues after the client's death." *Id.*

37. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1983); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 171 (2d ed. 1994).

confidential communications between attorney and client, but all information concerning the representation, whether confidential or not.[38]

The reality of the relationship between the privileges is less than ideal. On the surface, it would appear that the ethical duty of confidentiality, with its expansive reach, provides better protection to confidential attorney-client communications.[39] Yet this ethical duty of confidentiality may ultimately be severed by a court order, which an attorney must obey.[40] In comparison, the evidentiary privilege is relatively narrow in scope, protecting a client from in-court disclosure, but providing no restriction on an attorney's disclosure of client confidences in extra-judicial settings.[41] In practice, however, the distinction is meaningless; without an assurance of a similar level of confidence outside the courtroom the underlying purpose of the privilege would be defeated.[42] As a result, an attorney must keep all client confidences, whether received confidentially or not, close to the vest until prompted by the court to do otherwise.[43] Yet an attorney can only truly guarantee his client as much protection as is spelled out by the limited evidentiary privilege.[44]

B. Justifying the Attorney-Client Privilege: The Ultimate Benefit or Detriment?

1. *The Law and Philosophy in a Vacuum*

Legal scholars occasionally resort to philosophical terminology when describing the justifications for confidentiality, contrasting deontological

38. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1983); MUELLER & KIRKPATRICK, *supra* note 37, at § 171.

39. *See* MUELLER & KIRKPATRICK, *supra* note 37, at § 171.

40. *See* MUELLER & KIRKPATRICK, *supra* note 37, at § 171; ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 19 (1983). Comment 19 states "If a lawyer is called as a witness to give testimony concerning a client . . . [the lawyer must] . . . invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." *Id.*

41. *See* MUELLER & KIRKPATRICK, *supra* note 37, at § 171; ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1983). Extra-judicial settings would incorporate disclosure outside court proceedings.

42. *See* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1106 (1985).

43. *See id.* at 1108-09.

44. *See* MUELLER & KIRKPATRICK, *supra* note 37, at § 171. For example, while the ethical duty of confidentiality would prevent an attorney from disclosing critical information shared by a client in front of a third party, the evidentiary privilege would not. *See* MUELLER & KIRKPATRICK, *supra* note 37, at § 171. *Cf.* Gary J. Holland, *Confidentiality: The Evidentiary Rule Versus the Ethical Rule*, 1990 ARMY LAW. at 17 (May 1990) (discussing the inconsistency between Military Rule of Evidence 502 and Army Rules of Professional Conduct for Lawyers Rule 1.6).

theory with utilitarianism.[45] In lay terminology, confidential communications can be justified as protecting individual rights (deontological theory), including those of the lawyer and client, or as balancing the interests of society against those of individuals (utilitarianism).

Under a deontological, or rights-based justification, the right to privacy is an entitlement.[46] In a legal context, this entitlement is best effectuated when confidential communications are protected.[47] In a practical sense, a client should not be penalized by a loss of privacy in an effort to protect or preserve other rights and interests through consultation with an attorney.[48] With deontological theory, individual rights are not trumped by societal interests, no matter the potential benefit—a source of substantial criticism.[49]

In comparison, under utilitarian theory privacy is an interest (as opposed to an entitlement) to be weighed against other societal interests, such as the furtherance of justice.[50] A utilitarian justification of confidentiality begins with the premise that the client will not feel free to disclose critical private information if confidentiality is not assured.[51] With truly protected communication, a greater trust will develop between attorney and client, and the client will be more likely to rely on the attorney's advice.[52] This is especially crucial where a client reveals a future plan with illegal implications, such that the attorney acts as society's safety net in discouraging the harmful plan.[53] An alternative utilitarian justification stems from the view that confidentiality promotes judicial economy. Fully accurate information helps an attorney decide the most prudent course of action, whether that is a settlement, plea bargain, or a well-organized and efficient trial.[54] These results, such as the

45. Although the most widely recognized, the deontological and utilitarian theories are not the only proposed justifications for confidential communications. Political theories underpinning the confidential communications privilege have been suggested as well. One approach suggests that privilege allows society's most powerful members to perpetuate the status quo. Another theory suggests that the confidential communications privilege improves the public's image of the legal system, in part by suppressing post-trial revelations that could endanger faith in the legal system. *See* Erick S. Ottoson, Comment, *Dead Man Talking: A New Approach to the Post-Mortem Attorney-Client Privilege*, 82 MINN. L. REV. 1329, 1335 (1998).

46. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY 226 (2 ed. 1998).

47. *See id.;* Subin, *supra* note 42, at 1160-61.

48. *See* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality,* 39 CATH. U. L. REV. 441, 446 (1990).

49. *See* RHODE, *supra* note 46, at 226-27.

50. *See* RHODE, *supra* note 46, at 20-21, 228-29.

51. *See* RHODE, *supra* note 46, at 228.

52. *See* Steven Goode, *Identity, Fees, and the Attorney-Client Privilege,* 59 GEO. WASH. L. REV. 307, 316 (1991).

53. *See id.*

54. *See id.* at 315.

protection of society from harmful plans or judicial economy, presumably benefit the justice system more than they hinder it.

Utilitarianism can be further distilled into rule-utilitarianism and act-utilitarianism.[55] Rule-utilitarianism calls for a one-time balancing, resulting in a firm rule to be applied in all like situations.[56] In applying rule-utilitarianism, priority is given to the best balancing of interests in general.[57] Under act-utilitarianism, each individual situation merits its own balancing test.[58] Therefore, act-utilitarianism is highly fact specific.

Turning to the practical application of these theories in the current case, Foster's concern for privacy and reputation could certainly implicate deontological justifications for confidentiality.[59] The Supreme Court has historically taken a utilitarian approach to supporting a confidential communications privilege.[60] While rights-based justifications for confidentiality were not ignored, the Court's consideration of the post-mortem attorney-client privilege traced a rule-utilitarian framework.[61] Justice O'Connor's dissent generally followed an act-utilitarian theory, advocating an *in camera* balancing of interests.[62]

2. *The Law and Philosophy—Problems with a Modern Application*

Not unlike the real-world tension between the ethical and evidentiary privileges, the real-world treatment of justifications for confidential communications raises serious concerns. Commentators and scholars have offered criticism that attorneys, rather than individual members of society or society

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55. *See* RHODE, *supra* note 46, at 20-21.

56. *See* RHODE, *supra* note 46, at 20-21.

57. *See* RHODE, *supra* note 46, at 20-21.

58. *See* RHODE, *supra* note 46, at 20-21.

59. *See Swidler*, 118 S. Ct. at 2086. The Court spoke of the individualistic concerns for the effects of disclosure on reputation, civil liability, and friends and family. *See id.*

60. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). In *Upjohn*, the Supreme Court stated that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The historical utilitarian view of the Court is evident in cases dating back over a hundred years. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("[The attorney-client privilege is] founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

61. *See Swidler*, 118 S. Ct. at 2086-87.

62. *See id.* at 2089 (O'Connor, J., dissenting).

itself, benefit the most from confidentiality.[63] Judicial economy in discovery, for example, may be hampered by the protection afforded confidential communications where that confidentiality increases the costs of gathering relevant information.[64] The prospect of attorney-client confidentiality preventing the disclosure of exculpatory evidence for the benefit of the falsely accused, or of withholding information on the location of an abducted child, is distasteful to most members of the legal profession and to society as a whole.[65] Further, the interests of the individual may actually suffer by confidentiality.[66] Invoking the attorney-client privilege for the sake of principle may in fact give the suggestion that the client has something to hide.[67]

The social value of the attorney-client confidential communications privilege is also criticized in comparison to other communications privileges such as the therapist-patient or priest-penitent privilege.[68] For example, the social value of litigation may be meaningless, even wasteful, where clients quarrel over fixed stakes or use litigation to suppress competition in the marketplace.[69] Consultations with a therapist or priest, however, may promote a more spiritually or emotionally healthful society.[70]

3. *Does Confidentiality Really Matter to Clients?*

Beyond philosophical theories, there is surprisingly little empirical evidence regarding the actual, real-time effect of confidentiality on client behavior.[71] The few studies that have been performed indicate that clients frequently do not understand the privilege, but that many attorneys and clients still feel that a general awareness of the privilege's existence encourages open communication.[72] The studies that have been performed lead to few, if any,

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63. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3 (1998).

64. *See id.* at 7.

65. *See id.* at 17. Without confidentiality, however, the guilty client might not confess to his attorney or reveal the whereabouts of the child. *See id.* The distaste returns, however, when applied to situation where the client is deceased. *See, e.g.*, Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976) (holding that a client's confession to his attorneys to two murders could not be revealed to exonerate another man standing trial for the crimes, despite the death of the client).

66. *See* Fischel, *supra* note 63, at 18-22.

67. *See* Fischel, *supra* note 63, at 18-22. Indeed, there is still much speculation about the content of Hamilton's notes, or what incriminating information Foster may have provided about Travelgate during their conversation. Yet it is entirely possible that the notes contain nothing incriminating—at all.

68. *See* Fischel, *supra* note 63, at 32-33.

69. *See* Fischel, *supra* note 63, at 33.

70. *See* Fischel, *supra* note 63, at 33.

71. *See Swidler*, 118 S. Ct. at 2087 n.4, 2088.

72. *See id.* at 2087 n.4. The three studies cited by the Court include: Vincent C.

firm conclusions.[73] According to two studies, many attorneys and clients believe that without the confidential communications privilege, attorney-client communication would be hampered.[74] Another study suggests that limited exceptions to the confidential communications privilege might not curtail open communication.[75]

In its opinion, the Court recognized that few court opinions have even addressed the effect of the post-mortem attorney-client privilege.[76] The Court suggested that this lack of discussion, or lack of evidence, points to a general presumption that the attorney-client privilege survives the death of the client.[77] Prior to the Court's decision even the leading legal commentators, whether critical of the privilege or not, operated from the presumption of survival of the post-mortem attorney-client privilege.[78]

Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 352 (1989); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962). As the court of appeals pointed out in its opinion, even if an attorney attempted to present the intricate details of confidentiality and its exceptions to a client, such information might be lost "given the likely impatience of the client with what may seem legalistic detail." *See In re Sealed Case*, 124 F.3d at 235.

73. *See Swidler*, 118 S. Ct. at 2087 n.4.

74. *See id.* (referring to Alexander, *supra* note 72, at 244-46, 261, and Comment, *supra* note 67, at 1236).

75. *See id.* (referring to Zacharias, *supra* note 72, at 382, 386).

76. *See id.*

77. *See id.* In the words of the Court, "if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist." *Id.* In fact, almost all cases concerning a post-mortem attorney client privilege are testamentary cases. *See* Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 58 n.65 (1992) (stating that approximately 380 of the 400 reported cases concerning the attorney-client privilege in relation to a deceased client were will-contest disputes).

78. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. c (Proposed Final Draft No. 1, Mar. 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege."); MUELLER & KIRKPATRICK, *supra* note 37, at § 199 ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators."); 1 MCCORMICK ON EVIDENCE § 94 (John William Strong ed., 4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); WEINSTEIN & BERGER, *supra* note 28, at § 503.32 ("[T]he general rule [is] that the lawyer-client privilege survives the death of the client."); WIGMORE, *supra* note 24, at § 2323 ("It has therefore never been questioned, since the domination of the modern theory, that the privilege continues . . . even after the death of the client"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.4 (1986) ("In general, courts hold that the death of the client does not end the privilege."); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498 (1986) (recognizing that the attorney-client privilege survived the death of the client at common law but suggesting that the protection was in fact very limited). For the ABA position, see *supra* note 36.

C. Punching Holes: The Attempt to Add an Exception to the Attorney-Client Privilege

Just as at common law, the Federal Rules of Evidence have left room for exceptions to the attorney-client privilege by calling for an evaluation of common law privilege principles in the light of reason and experience.[79] Exceptions to the attorney-client privilege, however narrow, do already exist.[80] Included in those exceptions are waiver by client consent, the crime-fraud exception, the testamentary exception, the attorney self-defense exception, and the government entity exception.[81] These exceptions, for the most part, are not believed to hinder open communication between attorney and client.[82] Consistent with this view, many of the few Supreme Court decisions on attorney-client privilege prior to *Swidler* demonstrated a trend towards erosion of the privilege.[83]

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79. *See* FED. R. EVID. 501.

80. *See* Ottoson, *supra* note 45, at 1339.

81. *See generally* Ottoson, *supra* note 45, at 1339-44.

82. *See generally* Ottoson, *supra* note 45, at 1339-44. The waiver exception allows the client to waive the attorney-client privilege. Since the waiver is at the will, and for the most part, the control of the client, it does not hinder open communications. The crime-fraud exception applies where, by an *in camera* review, a court determines that the confidential communications were made in furtherance of, or in an attempt to conceal, a crime or fraud. While the knowledge that such communications are not privileged might hinder a client's open communication, that is an acceptable result, since legal advice should not be used for illegal purposes. The testamentary exception, as the only exception dealing with a deceased client, allows disclosure of information necessary to reconcile a disputed estate. Presumably the client would want his confidential communications disclosed to further such a purpose. *See* Ottoson, *supra* note 45, at 1339-44. *But see infra* text accompanying notes 133 to 134 (suggesting that post-mortem testamentary disclosure might not further the client's intent). The attorney-self defense exception allows an attorney to reveal confidential communications only as necessary to put on a defense, which should not hinder communication since such a situation is usually the unforeseen consequence of an attorney-client relationship gone bad. As the newest exception, the "government entity" exception is a companion to the crime-fraud exception. In *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), the Eighth Circuit held that the confidential communications privilege does not operate between a government attorney and a White House official in a federal criminal investigation. By this decision, confidentiality took a back seat to the government's need for criminal justice. *See* Ottoson, *supra* note 45, at 1344. Like the crime-fraud exception, the government entity exception is not concerned with promoting confidentiality but rather with preventing misuse or abuse of the legal profession towards unsavory purposes.

83. *See generally* United States v. Zolin, 491 U.S. 554 (1989) (permitting in camera review to determine whether privileged attorney-client communications fall within the crime-fraud exception); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (holding that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications); Fisher v. United States, 425 U.S. 391 (1976) (compelling production of accountants' documents in possession of taxpayers' attorneys where taxpayers were under investigation by the IRS, whether or not Fifth Amendment might have prevented production of the documents if they were in taxpayers'

Upon considering the Foster situation, the Court of Appeals for the District of Columbia Circuit decided that reason and experience could warrant another exception to the attorney-client privilege.[84] The court of appeals acknowledged the benefits of a post-mortem privilege in maintaining a client's privacy interests and encouraging open communication between attorney and client.[85] The court reasoned, however, that these benefits could not outweigh the judicial need for truthful information in every case.[86] Accordingly, the court of appeals set up a balancing test in criminal cases, pitting the deceased client's individual interest in his privacy and reputation, as well as the ever-present concern for the attorney-client relationship on a larger societal scale, against the need for information of substantial importance in the particular case or context.[87]

IV. REASONING OF THE COURT

In *Swidler & Berlin v. United States*,[88] the United States Supreme Court held that James Hamilton's notes made during his meeting with Vince Foster were still protected by the attorney-client privilege despite Foster's death.[89] At the outset of the opinion, the Court recognized the long-held protection afforded confidential communications between attorney and client.[90] The Court stated the underlying rationale for this privilege as promoting full and frank communication between attorney and client, such that an attorney will have access to all information necessary to provide effective legal assistance.[91] The Court recognized that it is in the public interest for clients to receive such assistance.[92] In evaluating whether curtailing the post-mortem attorney-client privilege would hinder this purpose, the Court, as directed by the Federal Rules

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possession).

84. *See In re Sealed Case*, 124 F.3d at 231.

85. *See id.* at 233.

86. *See id.* at 234.

87. *See id.* at 234-35.

88. 118 S. Ct. 2081 (1998).

89. *See id.* at 2083. Chief Justice Rehnquist wrote the 6-3 majority opinion, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. *See id.* Justice O'Connor wrote a dissenting opinion, in which Scalia and Thomas, JJ. joined. *See id.* at 2088 (O'Connor, J., dissenting).

90. *See Swidler*, 118 S. Ct. at 2084. In support of this historic belief, the Court cited to two cases spanning almost a century between them: *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *Hunt v. Blackburn*, 128 U.S. 464 (1888).

91. *See Swidler*, 118 S. Ct. at 2084. The Court stated: "The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* (quoting *Upjohn*, 449 U.S. at 389).

92. *See id.*

of Evidence, evaluated the common law experience of the judiciary in the light of reason and experience.[93]

The Court addressed the limited, but supporting, case law for the Independent Counsel's broad position that the post-mortem attorney-client privilege should cease where the protected material is relevant to a criminal proceeding.[94] The Court recognized, however, the prevailing common law experience of the United States that the death of a client does not erode the privilege in any way.[95] Further, the Court pointed out that three state supreme courts had expressly held that that the attorney-client privilege unequivocally survived the death of a client.[96]

The Court then turned to cases that allowed an exception to a deceased client's attorney-client privilege in the limited context of testamentary disputes.[97] Although these cases typically recognized that the attorney-client privilege survives the death of the client, they allowed exceptions on the basis that the client's intent would be furthered by disclosure.[98] The Court pointed out that it had endorsed such an approach as early as 1897 in *Glover v. Patten*.[99]

Having established that in the prevailing case law the attorney-client privilege is presumed to survive the death of the client, the Court then turned

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93. *See id.* The test originates from FED. R. EVID. 501. *See supra* note 26. The Court also cited to *Funk v. United States*, 290 U.S. 371 (1933), which contains a thorough discussion of importance of the flexibility and adaptability of common law to modern experience.

94. *See Swidler*, 118 S. Ct. at 2084. *See also* Transcript of Oral Argument at *32, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192), *available in* 1998 WL 309279. Prior to the Court of Appeals for the District of Columbia Circuit decision, the Pennsylvania Supreme Court developed its own balancing test in the context of a civil case. Working from the general presumption of post-mortem attorney-client privilege, the court stated it could make an exception where compelled to do so in the interest of justice, and where the deceased client's interest in upholding the privilege was insignificant. *See* Cohen v. Jenkintown Cab Co., 357 A.2d 689, 692-93 (Penn. 1976).

95. *See Swidler*, 118 S. Ct. at 2084-85. To illustrate this point the Court cited to three cases assuming the survival of the privilege after the client's death: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *Morris v. Cain*, 1 So. 797 (La. 1887); *New York v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994).

96. *See Swidler*, 118 S. Ct. at 2085. The three courts are the Massachusetts, South Carolina, and Arizona Supreme Courts. *See. respectively, In re* John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990); South Carolina v. Doster, 284 S.E.2d 218 (S.C. 1981); Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976). New York, California, and Oklahoma state appellate courts have also declined to allow privileged attorney-client communications into evidence in criminal matters after a client's death. *See* Brief for Petitioner at 20 n.16 (citing New York v. Modzelewski, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); California v. Pena, 198 Cal. Rptr. 819 (Cal. Ct. App. 1984); Cooper v. Oklahoma, 661 P.2d 905 (Okla. Crim. App. 1983)).

97. *See Swidler*, 118 S. Ct. at 2085.

98. *See id.*

99. 165 U.S. 394 (1897).

to the Independent Counsel to prove the common law tradition wrong.[100] The Court called upon the Independent Counsel to show that reason and experience warranted modification of the rule; a task at which the Independent Counsel ultimately failed.[101]

Rejecting the Independent Counsel's analogy that the interest in settling estates was akin to the interest in determining whether a crime had been committed for the purposes of outweighing the interest in protecting confidentiality, the Court pointed to the client's intent.[102] While a client might wish his confidence revealed to settle his estate appropriately, the Court found nothing to suggest that a client would routinely desire his confidential communications disclosed to a grand jury, or that such a post-mortem evaluation of his intent even be taken.[103]

The Court next touched on the battle of the learned treatises: those in support of the post-mortem attorney-client privilege, and those which recognize such support, but criticize it.[104] The Court passed over this criticism with little comment, asserting instead the conventional justifications for protected communication between attorney and client.[105] The Court feared that the goal of full and frank communication between client and attorney might be stifled by a client's knowledge that his communications could be unprotected (even if only in a criminal context) after his death.[106] The Court expressly recognized

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100. *See Swidler*, 118 S. Ct. at 2085.

101. *See id.* at 2085-88.

102. *See id.* at 2086.

103. *See id.* Indeed, during oral argument, Associate Counsel Brett M. Kavanaugh set forth the following proposition regarding intent: "[P]resume that a person near death would want to fulfill what this Court has called his basic obligation as a citizen to provide information to the grand jury[.]" Justice Souter responded: "[A] great many people who know they have that obligation . . . do not, in fact, want to fulfill it . . . we're being realistic." *See* Transcript of Oral Argument at *29-30.

104. *See Swidler*, 118 S. Ct. at 2086. Commentators demonstrating support for the privilege include: MCCORMICK, *supra* note 78, at § 94; WIGMORE, *supra* note 24, at § 2323; Frankel, *supra* note 77, at 78-79. Commentators criticizing the privilege include: RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmts. c & d (Proposed Final Draft No. 1, Mar. 29, 1996); MUELLER & KIRKPATRICK, *supra* note 37, at § 199; WRIGHT & GRAHAM, *supra* note 78, at § 5498.

105. *See Swidler*, 118 S. Ct. at 2086. Specifically, the court intoned:

> Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends and family.

Id.

106. *See id.*

the potential client concerns for reputation, civil liability, or possible harm to friends and family, opining that such concerns may result in as much apprehension for post-mortem disclosure as for disclosure during a client's lifetime.[107]

Next, the Court turned to the Independent Counsel's proposal that confidential communications would not be affected by a rule permitting posthumous disclosure because the only clients who would fear such disclosure were those who intended to perjure themselves.[108] The Independent Counsel posited that truthful clients, or clients asserting their Fifth Amendment privilege, would not be discouraged from communicating with their attorneys by a rule permitting posthumous disclosure.[109] The Independent Counsel based this theory on the presumption that those clients would have revealed the privileged information under the right circumstances (for example, a grant of immunity) while living.[110] The Court, however, swiftly rejected this correlation between attorney-client privilege and the Fifth-Amendment protection against self-incrimination, noting that the latter serves a more limited purpose, and implicates far fewer circumstances, than the former.[111]

Demonstrating that the attorney-client relationship is much richer than just that of attorney-criminal defendant, the Court pointed to the role of attorneys as personal and family counselors.[112] According to the Court, in order for the client to truly receive the full benefit of legal advice, a client must feel comfortable revealing relevant private familial or financial information to an attorney.[113] Dismissing the Independent Counsel's analogy, the Court asserted that attorney-client communication could be obviously foreign to the Fifth Amendment protection against self-incrimination or criminal problems, and yet stifled by a criminal posthumous exception.[114]

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107. *See id.*
108. *See id.*
109. *See id.*
110. *See Swidler*, 118 S. Ct. at 2086.
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.* The Court's eloquent expression of the depth of the attorney-client relationship was as follows:

> Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

Id. In elaborating on the depth of the attorney-client relationship, the Court may also have been

Further, the Court recalled its previous holdings that the loss of evidence due to privilege was justified because without the privilege, the information might have never been disclosed.[115] The Court then extended this rule to a posthumous application, noting that this might well have been the case with Foster.[116]

The Court also noted that even if posthumous disclosure were limited to criminal cases (as the Independent Counsel suggested), or information of substantial import in criminal cases (as the court of appeals suggested), it would be impossible for a client to know what part of the current information he disclosed to his attorney might fall into those categories later. This uncertainty, brought about by comparing the need for a particular disclosure against the interests of society and the deceased client in protecting confidentiality, was the sort of balancing test the Court had twice previously rejected.[117]

The Court declined to add to the established exceptions to the attorney-client privilege because of the dearth of empirical evidence on whether limiting privilege would hamper the goal of full and frank communication.[118] The Court opined that, while the current exceptions were harmonious with the privilege's purpose, a posthumous exception seemed inconsistent with those goals.[119] Further, the Court decried the Independent Counsel's suggestion that

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responding to the Court of Appeals for the District of Columbia Circuit's limited focus that confidences are shared "in the high-adrenaline situation likely to provoke consultation with counsel . . . ." *See In re Sealed Case*, 124 F.3d at 233.

115. *See Swidler*, 118 S. Ct. at 2086-87. The Court cited to *Jaffee v. Redmond*, 518 U.S. 1 (1996), and *Fisher v. United States*, 425 U.S. 391 (1976).

116. *See Swidler*, 118 S. Ct. at 2086-87. Foster sought Hamilton's assurance that the conversation would be privileged at the outset, as is reflected by the notation "Privileged" near the beginning of Hamilton's notes. *See* Brief for Petitioner at 2. *See also supra* note 10. Echoing Hamilton's sentiments, the Court reflected, "[I]t seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged." *See Swidler*, 118 S. Ct. at 2087.

117. *See id. See also* Jaffee v. Redmond, 518 U.S. 1 (1996) (holding that a psychotherapist-patient privilege exists, and rejecting a Seventh Circuit balancing test that, where justice required, would have weighed the evidentiary need for disclosure of communications against the patient's interest in privacy); Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that a corporation's attorney-client privilege includes communications between its counsel and middle/lower-level employees, and rejecting a Sixth Circuit "control group" test, that would protect corporate attorney-client communications only where the employee was in a position to control the corporation's action in response to legal advice).

118. *See Swidler*, 118 S. Ct. at 2087-88 n.4. (discussing studies examining the relationship between privilege and communication). *See also supra* notes 72 to 75 and accompanying text. Commenting on the limited number of studies examining the relationship, the Court stated in its closing, "In an area where empirical information would be useful, it is scant and inconclusive." *Swidler*, 118 S. Ct. at 2088.

119. *See Swidler*, 118 S. Ct. at 2087. The two existing exceptions mentioned by the Court were the testamentary exception and the crime-fraud exception. *See id.* For a discussion of the relationship between the underlying purposes of attorney-client privilege and the testamentary

"one more" exception would have marginal impact, suggesting this could open the floodgates to the erosion of privilege on grounds other than those prescribed by law.[120]

At the close of its opinion, the Court turned to the dilemma of the high value placed on privilege as frustrating the judicial goal of truth-seeking.[121] The Court declined to give more weight to the truth-seeking function of the judiciary, again expressing the long held reverence for attorney-client privilege and the historic view that it survives the death of a client.[122] In reversing the decision of the court of appeals, the Court recognized that if presented with a compelling reason to overturn the common law rule, Rule 501 of the Federal Rules of Evidence provided the discretion to do so.[123] The Independent Counsel's argument, however, was not compelling enough to warrant such a modification.[124]

The dissenting opinion picked up where the majority opinion left off.[125] The fundamental premise from which Justice O'Connor developed her dissent was the inconsistency in the protections afforded by privilege and the judicial goal of truth-seeking.[126] Justice O'Connor supported the court of appeals' balancing test, reflecting that evidentiary privileges must be construed narrowly and "give way" where not justified in the public interest.[127] Justice O'Connor also expressed support for examination of the privilege where its use would frustrate justice.[128] While recognizing a deceased client's personal, reputational, and economic interest in confidentiality, Justice O'Connor stressed that were the client living, the facts he shared with his attorney would

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and crime-fraud exceptions, see *supra* note 77.

120. *See Swidler*, 118 S. Ct. at 2087. Specifically, the Court admonished, "A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common law principles or 'reason and experience.'" *See id.*

121. *See id.* at 2087-88. The Independent Counsel had urged that the privilege be strictly construed as inconsistent with truth-seeking, relying on *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting an absolute, unqualified executive privilege of confidentiality for presidential communications), and *Branzburg v. Hayes*, 408 U.S. 665 (1972) (rejecting a newspaper reporter's claim of privilege under the First Amendment against revealing confidential sources involved in criminal activity). The Court rejected this argument, pointing out that *Nixon* and *Branzburg* advocated the creation of new privileges, while the Independent Counsel urged the Court to curtail a well-recognized existing privilege. *See Swidler*, 118 S. Ct. at 2087-88.

122. *See Swidler*, 118 S. Ct. at 2088.

123. *See id.*

124. *See id.*

125. *See id.* (O'Connor, J., dissenting). Justices Scalia and Thomas joined in the dissent. *See id.*

126. *See id.* (O'Connor, J., dissenting).

127. *See id.* (O'Connor, J., dissenting).

128. *See Swidler*, 118 S. Ct. at 2088 (O'Connor, J., dissenting).

not be privileged, and if necessary, could be disclosed under a grant of immunity.[129]

Justice O'Connor expressed concern for the scenario where an innocent defendant might be convicted despite exculpatory information known by a deceased client's attorney.[130] Following an act-utilitarian framework, Justice O'Connor's dissent was fraught with reluctance to hold the right to confidential communications universally supreme to the rights of an innocent defendant; however, Justice O'Connor further called for a posthumous exception upon a showing of a compelling law enforcement need for privileged information.[131] Rather than permitting the attorney-client privilege to serve as a complete bar to post-mortem disclosure, thus allowing distortion of the judicial record or the purposeful misleading of the factfinder, Justice O'Connor would advance the application of an *in camera* balancing test for factual information otherwise unattainable.[132]

Justice O'Connor also pointed to a flaw in the majority opinion's justification of the testamentary exception to the attorney-client privilege.[133] While the majority explained that such an exception would further the intent of the client, Justice O'Connor suggested that this might not always be the case.[134] Further, Justice O'Connor pointed out that the role of the attorney as a counselor, confidant, and friend (used by the majority as a justification for non-disclosure in criminal and civil matters) was equally true in the testamentary context.[135] Justice O'Connor also challenged the proposition that the crime-fraud exception to the attorney-client privilege, as well as the exception for claims regarding attorney competence and compensation, encourage full

129. *See id* at 2088-89 (O'Connor, J., dissenting).

130. *See id* at 2089 (O'Connor, J., dissenting). As Justice O' Connor noted, the Petitioner conceded that this might be just the type of situation where an exception to the post-mortem attorney-client privilege should be made. *See* Transcript of Oral Argument at *19-20. It is perhaps relevant to note that prior to being appointed to the Supreme Court in 1981, Justice O'Connor practiced law in Arizona (in private practice from 1957-65, and as Assistant Attorney General from 1965-69), served as a member of the Arizona Senate (1969-1975), and served as a county court judge (1975-1979) and on the Arizona Court of Appeals (1979-1981). *See* Labaton, *supra* note 8, at A19. It was an Arizona Supreme Court case that in 1976 excluded the testimony of two attorneys whose deceased client had confessed to the murders for which the defendant was ultimately convicted. *See Macumber*, 544 P.2d at 1086.

131. *See Swidler*, 118 S. Ct. at 2089 (O'Connor, J., dissenting).

132. *See id.* (O'Connor, J., dissenting).

133. *See id.* at 2089-90 (O'Connor, J., dissenting).

134. *See id.* (O'Connor, J., dissenting). To illustrate this pitfall, Justice O'Connor reiterated the court of appeals' example that "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." *See id.* at 2089 (quoting *In re Sealed Case*, 125 F.3d at 234).

135. *See id.* at 2089-90 (O'Connor, J., dissenting).

and frank communication between attorney and client.[136] Justice O'Connor instead found that the underlying purpose of those exceptions was to protect the adversary system itself, rather than the individual client.[137]

In concluding, Justice O'Connor questioned the tacit acceptance of the post-mortem attorney-client privilege as an established common law tradition, focusing on the vacuum of reasoned express holdings rather than the many holdings expressing the mere presumption of its survival.[138] Relying on many of the same authorities as the court of appeals and the Independent Counsel, Justice O'Connor concluded by stating her dislike for the costs imposed by silence.[139] Indeed, Justice O'Connor's strong preference is for an exception to the post-mortem attorney-client privilege when necessary to protect the rights of an innocent criminal defendant or a compelling law enforcement interest.[140]

V. SIGNIFICANCE

By preserving the post-mortem attorney-client privilege, the Supreme Court deferred to centuries of common law historical practice. Prior to the Court's decision in *Swidler*, many practicing attorneys simply assumed, if only by an absence of consideration, that the confidential communications privilege was eternal. For most attorneys across the nation, the rise of the *Swidler* case was a disconcerting challenge to that presumption, and one that could have completely changed the dynamics of the attorney-client relationship.[141]

With the *Swidler* decision, it would appear that clients can rest assured their confidences or reputations will not be betrayed after their death.[142] Clients are free to communicate openly and honestly about friends, family members, and loved ones in the course of seeking legal advice. Despite a paucity of evidence as to whether clients do indeed ponder that confidentiality before

136. *See id.* at 2090 (O'Connor, J., dissenting).

137. *See Swidler*, 118 S. Ct. at 2090 (O'Connor, J., dissenting). Justice O'Connor's expressed concern for the adversary system and her protectiveness of the legal profession as a whole was also prevalent in her majority opinion regarding lawyer advertising. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). In *Florida Bar*, after conducting a two year study on the effects of lawyer advertising on public opinion, the Florida Bar sought to prohibit personal injury lawyers from direct-mail solicitation of accident victims for 30 days after an accident. *See id.* at 626-28. Writing for a 5-4 majority, in the course of upholding the ban, Justice O'Connor recognized the ban as a positive step in alleviating the "distress [caused by the targeted mailings] that has caused many [Floridians] to lose respect for the legal profession." *See id.* at 633.

138. *See Swidler*, 118 S. Ct. at 2090 (O'Connor, J., dissenting).

139. *See id.* (O'Connor, J., dissenting).

140. *See id* (O'Connor, J., dissenting).

141. *See* Parloff, *supra* note 9, at 5-6. Parloff's article described the case as "one of transcendent importance to lawyers throughout the country." *See* Parloff, *supra* note 9, at 5.

142. Except, of course, in the context of the already established testamentary exception.

revealing secrets, the Supreme Court focused on an idealistic view of the legal profession where both clients and attorneys must speak candidly in order to do the right thing.

Whether attorneys will find renewed faith in this trust remains to be seen. Notably absent from the Court's opinion was any explicit remonstrative, or even encouraging, tone directing the legal profession to observe confidentiality in an honorable fashion. It is surely unrealistic to assume that clients only consult with attorneys to make things right, or that attorneys only take pride in preserving confidentiality for the sake of honor alone.[143]

Yet despite any lack of overt moral direction, the Supreme Court's recognition that many clients view their attorneys not just as legal advisors but also as confidants, friends, and counselors is a subtle reminder to the members of the legal profession of the weight and effect of their opinions and suggestions. Attorneys must now be mindful that the heavy cloak of protection provided to the attorney-client privilege for confidential communications does not lower expectations or standards for the legal profession as a whole.

By examining the common law in the light of reason and experience, the Supreme Court has breathed new life into the law of confidential communications. The assault on privilege was halted, if only temporarily. In deferring to the lack of empirical data on the effects of confidentiality on clients as a group, the Court chose instead to err on the side of protecting the rights of the individual client. In *Swidler,* the Court concluded that the time had not come for another exception to the attorney-client privilege. This does not mean, however, that such a time will never come.[144]

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143. *See* Fischel, *supra* note 63. Advancing a skeptical view, Fischel states, "If confidentiality does not increase the probability of winning, it has no independent value." *See* Fischel, *supra* note 63, at 18.

144. *See Swidler,* 118 S. Ct. at 2088. Indeed, the privilege may be more successfully attacked in the future if further studies are performed and prove confidentiality has a minimal effect on client behavior.